Supreme Court, U.S.
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No. 92-1918

In The

# Supreme Court of the United States

October Term, 1992

JAMES HAMILTON, et al.,

*Petitioners,*

v.

THE GROCERS SUPPLY COMPANY,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## THE GROCERS SUPPLY COMPANY'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether an employment decision allegedly based on higher wages earned by older employees constitutes unlawful age discrimination.

2. Whether persons under the age of 40 have standing to assert ADEA claims.

## PARTIES TO THE PROCEEDING IN THE COURT BELOW

Grocers Supply Company was the Defendant-Appellee in the court of appeals.

Petitioners are comprised of the 192 individuals and representatives listed below: James E. Hamilton, Eli Abrams, A. B. Allen, Jack Allen, Marion Amos, Rubin Aguilar, Ray Baker, Wilbert W. Baker, Javier Barba, Johnny L. Battles, Clyde D. Beard, Edward Bennett, Louis F. Bias (deceased), Jonathan T. Blacknall, Gene Bland, Roosevelt V. Bolds, Jim Bowden, Robert Lee Branch, Julius A. Britto, Eddie Brooks, Mack D. Brown, Terry Brown, Eddie M. Brown, Melvin Burton, Roy Butler, James Z. Calloway, Ernesto P. Cardenas, Joseph M. Castille, Nathaniel Cephas, David Cervantes, Able Chacon, Melvin Charles, Tracy Chinn, Derek Chopp, Edgar Cisneros, James Clay, Berry Conley, Howard Conely, Sammie Cooks, Donald Ray Craft, Adell Cross, Joseph Daigle, Paul Darjean, Vernon Davis, David DeCoux, Herbert E. Demby, L. K. Dennis, Charles F. Dirden, Albert Duarte, Bobby L. Ellison, Alberto Espinoza, Adam Ettienne, Reginald Evans, Frank E. Fanniel, Berley C. Fields, Woodrow Fisher, Garfield Flores, Henry Ford, Alvin Francis, Francisco Garcia, Freddie Garriett, Henry George, James Gipson, Robert R. Grace, Dorris M. Graham, Joseph Grant, Gus Charles Green, Floyd D. Green, Clarence Green, Clyde J. Guillory, Perry Hall, Curtis Hall, Eugene Hall, Louis Hall, Abraham Hamilton, Robert Harris, Michael A. Hatton, Jesse James Hemphill, Whaley L. Henry, Albert C. Hines, McCoy Holcomb, Linard Holden, William M. Holiday, Adrian Huerta, Geronimo Huerta, Arthur Jackson, Alvoird K. Jackson, Gilbert Jackson,

## PARTIES TO THE PROCEEDING IN THE COURT BELOW – Continued

Willie Jackson, Joseph James, Alvin Johnson, James W. Johnson, Willie Johnson, Larry Johnson, Kennie R. Johnson, Will J. Johnson, Robert Lee Jones, Archie W. Jones, Lewis Curtis Jones, Herbert Jones, Fred Kennedy, B. J. King, Wilfred Kinnerson, Ervis LeFleur, Bobby Lambert, John W. Landry, Leon J. Leday, Ryan Levy, Juan Lopez, James Loza, Herbert Lynch, Ernest Maes, Roy Marquez, Lee Martin, Arthur Martinez, Oscar Matthews, Early McCalister, Charles McCoy, Evert McCoy, Stacy McGregor, Harry Means, J. L. Menifee, Robert Mack Mills, Otis Moore, Willie Moore, Rufus H. Moshay, Armando Moya, Felix W. Nelson, Herbert Norman, Emanuel Olford, Rudolph Owens, Oliver Palmer, Hector Pena, Artis Preston, George Price, Sam Price, Robbie Gene Price, Ray Floyd Pryor, Jeffrie Randall, Henry S. Remaker, Roy Richardson, Maurice Robertson, Ivery E. Robins, Billy Joe Robinson, Homer Robinson, James Rogers, Will A. Rogers, Santos Rojas, Salvador Ruiz, James E. Russell, Ron Saenz, Antonio Salazar, Elmer D. Sanders, James Sawyer, Milton Earl Scott, Roy Sharp, James T. Seals, Wilbert Shepherd, Billy R. Simmons, Marshall Simpson, Jimmie Smith, Argustus Smith, Michael Sneed, Daniel Soliz, R. C. Stanley, Oscar Steward, Overton Stewart, Don L. Sweat, Johnnie Therance, Roosevelt Thomas, Shirley Thomas, Morris Thompson, Cleve Vercher, Herman Walker, Barney E. Walsh, Billy Washington, Joseph Wesley, Jerry White, Willie Ray White, Willie L. White, Waddell Wiggins, Robert Wilkerson, Razz Williams, James E. Williams, Dan R. Williams, Lee Otis

## PARTIES TO THE PROCEEDING IN THE COURT BELOW – Continued

Williams, James W. Wilmore, Annie Jackson (administrator for T.J. Jackson, decesased), Irma Gene Scott (administrator for Jeff Scott, deceased), Shirley Ann Hayes (administrator for Walter Hayes, deceased), Daisy Simpson (administrator for William Simpson, deceased), and A. B. Allen (administrator for Johnny Allen, deceased).

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## THE GROCERS SUPPLY COMPANY'S RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## STATEMENT OF THE CASE

This is one of two age discrimination cases brought by several hundred strikers who were denied reinstatement to their jobs at the end of their strike. In this case the trial court granted Grocers Supply Company's motion for directed verdict following the close of plaintiffs' evidence.

The other case, styled *Britt v. Grocers Supply Company,* involved a different group of strikers represented by

different counsel, but essentially the same age discrimination claim. A different district judge granted summary judgment against the *Britt* plaintiffs.

On appeal, the *Britt* case was consolidated with the *Hamilton* case. The Fifth Circuit affirmed both judgments.

The *Britt* plaintiffs filed a petition for writ of certiorari on March 15, 1993,[1] which this Court has already denied. 61 U.S.L.W. 3818 (June 7, 1993).

## REASONS FOR DENYING THE WRIT

### I.

### This Court Has Recently Rejected The Petitioners' Theory That Discharging Older Employees To Save Salary Costs Violates The ADEA

Hamilton asserts that there is a conflict among the circuits on whether the ADEA prohibits the discharge of older employees because of their higher salary or benefits. This asserted conflict no longer exists in light of this Court's recent decision in *Hazen Paper Co. v. Biggins,* 113 S.Ct. 1701 (1993), a decision which Hamilton has surprisingly ignored in his petition for certiorari.

*Hazen Paper* makes clear that there is no unlawful disparate treatment under the ADEA when the motivating factor is some feature other than the employee's age. *Id.* at 1705. This is true "even if the motivating factor is

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[1] Unlike the *Hamilton* plaintiffs, the *Britt* plaintiffs chose not to file a petition for rehearing to the court of appeals, and therefore their deadline for filing a petition for certiorari was earlier.

correlated with age, as pension status typically is." *Id.* at 1706. As the court explained:

> Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age-based."

*Id.* at 1707. The Court's opinion thus expressly adopts the reasoning of the Fifth Circuit in *Williams v. General Motors Corp.*, 656 F.2d 120, 130 n. 17 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) ("seniority and age discrimination are unrelated"), the case on which the court below expressly relied. The *Hazen Paper* opinion also cites with disapproval the Seventh Circuit decision in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), on which Hamilton principally relies. 113 S.Ct at 1705, 1707.

Thus, this Court has already addressed the conflict in the circuits which Hamilton invokes, and has resoundingly rejected Hamilton's wage proxy theory. There is no need for this Court to revisit the issue now.

## II.

**The Fifth Circuit Did Not Address The ADEA Standing Issue Now Urged By Hamilton, And Therefore There Is No Conflict With Decisions of Other Circuits**

Contrary to Hamilton's assertion, the Fifth Circuit below never addressed the issue of whether persons under the age of 40 have standing to bring an ADEA claim. A careful reading of the Fifth Circuit's opinion on rehearing shows that court's concern was whether a violation of the ADEA had been proven, and *not* which

parties had a statutory right to assert such a violation. The Fifth Circuit merely concluded that no prima facie violation had been shown "in light of the lack of evidence showing that younger strikers were more favorably treated than older strikers." *Hamilton v. Grocers Supply Co., Inc.*, 986 F.2d 97, 99 (5th Cir. 1993).

Even had the Fifth Circuit reached the standing issue and decided it adversely to Hamilton, no conflict would have arisen because there are no circuit court decisions going the other way. This is not surprising, because Hamilton's novel "under 40" standing theory contradicts the clear command of the statute:

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

29 U.S.C. § 631(a). Consistent with this straightforward statutory limitation, the circuit courts have uniformly required the ADEA plaintiff to prove at a minimum membership within the protected age group. *See, e.g., Young v. City of Houston*, 906 F.2d 177, 182 n. 5 (5th Cir. 1990).

## CONCLUSION

For these reasons, the petition for writ of certiorari should be denied, as was the petition filed by the *Britt* plaintiffs in the companion case.

Respectfully submitted,

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